SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

REPLY BRIEF OF ROY GRANATA, ETC., RESPONDENT

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This brief, filed by leave of the Court granted at the time of argument, is intended as a reply to the suggestion, made for the first time[1] in the brief filed in this Court by the

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[1] In the court below petitioner made no such contention, and no mention of such a contention is to be found in his petition for a writ of certiorari. The specification of errors, included in the Solicitor General's brief, at page 7 thereof, in accordance with paragraph 6 of Rule 27 of this Court, also does not raise the point.

Solicitor General on behalf of the petitioner, that neither the court below nor this Court has jurisdiction in this cause.

Summary of Argument

The intervening Union's property rights in and under the collective bargaining contract between the Union and the respondent Corporation would have been diminished and curtailed by the plaintiff's success in the district court, since such success could be based only upon a holding that the seniority provisions of such contract were not binding upon the employer defendant, the plaintiff, or other employees similarly situated. This gave the Union a sufficient interest to intervene; having on these grounds been permitted to intervene, and having submitted for adjudication its claim that its contract was binding upon the original litigants, the Union became a party for all purposes, including that of appealing from the district court's judgment. For that judgment adversely affected the Union's rights by not only absolving the employer from compliance with the seniority provisions of the contract under certain circumstances, but, indeed, by punishing him and threatening him with future punishment for compliance therewith.

The intervening Union's actual status in the district court was, in relation to the plaintiff, that of defendant; in relation to the employer defendant, that of a plaintiff. Since the money judgment against the employer was perforce based upon an adjudication of the Union's rights and the employer's obligations under the collective bargaining contract, the Court's judgment, though not in terms, ran also against the Union's asserted rights. Those rights were permanently diminished, since the Union, having submitted its interest in the collective bargaining contract to consideration and adjudication by the district court, was prevented either by the doctrine of estoppel or of res

judicata from relitigating this question with the employer. Accordingly, the case did not, as to the Union, become moot by reason of the expiration, prior to the appeal to the court below, of the period of one year from the date of the plaintiff's restoration to his position.

ARGUMENT

I

Respondent Union Had Sufficient Interest as an Intervener in the District Court to Support an Appeal from the Judgment Entered Therein

In 10 Cyc. of Federal Procedure (2nd edition), Sec. 5006, the rule is thus stated:

> "Persons who have been allowed to intervene in a suit become parties thereto with all the rights and privileges which attach to the relation, including that of prosecuting an appeal from the judgment or decree which affects their legal interest. * * *"

The rule is similarly stated in Moore, *Federal Practice*, section 24.11, p. 2371:

> "The intervener, once intervention has been allowed, has the right to appeal from all interlocutory and final orders which affect him, and from which an appeal is given by statute, whether the right under which he intervened was originally absolute or discretionary. * * *"

The interest of the intervening Union in this dispute does not arise out of a mere general economic interest, as in *Alexander Sprunt & Son.* v. *United States*, 281 U. S. 249; nor out of a mere interest in having a desired rate prevail, as in *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577; nor out of a mere interest in having an advantageous

precedent established, as in *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632. Nor did the decision of the district court fail to affect the intervener and its members or their rights, as in *International Brotherhood* v. *Keystone Freight Lines*, 123 Fed. (2d) 326 (10th Circuit).

What supported the intervention of the Union in the district court was the claim of the plaintiff therein that the contract between the Union and the Corporation did not constitute a bar to his recovery. Paragraph "Fifteenth" of the complaint (R. 6). The intervener, of course, maintained that its collective bargaining agreement with the Corporation, entered into pursuant to the National Labor Relations Act, was binding upon the employer corporation and the plaintiff, was consistent with the provisions of the Selective Training and Service Act, required that the plaintiff be "shaped up" in accordance with his seniority standing, and precluded recovery by the plaintiff. Answer of Intervener, paragraphs 8 to 14 and 17 to 19 (R. 9-13). Thus the actual issue in litigation among all parties was the interpretation of the collective bargaining agreement and the extent of its effectiveness in the light of the Selective Training and Service Act and no judgment could have been rendered in the plaintiff's favor if the intervening Union's and the defendant's contentions were correct.

The Union's interest in the collective bargaining agreement and in the litigation, was both that of a principal acting to protect its own property rights under such agreement, and that of a statutory representative of the other employees of the corporation, whose property rights of seniority under the agreement were endangered by the plaintiff's claim. If traditional criteria of what constituted the property rights of the Union must be found, they will be seen to flow from the fact that a collective bargaining

agreement forms the foundation of effective representations by the union that employees should, in order to obtain beneficial conditions of employment and equality of treatment from the employer, join the Union and thus designate it as their collective bargaining representative. When the conditions of employment spelled out in a collective bargaining agreement are made inapplicable to a certain class of employees, the Union's ability effectively to solicit and obtain membership and to function as a bargaining agent is reduced.

By awarding damages to the plaintiff, the district court decided that the collective bargaining agreement either did not have the meaning contended for by the intervener and the employer, or that it was not binding upon the employer. Indeed, the effect of the district court's determination of the dispute was to penalize the employer for having observed its contract with the intervener by requiring it to pay damages to the plaintiff. The judgment of the district court thus clearly affected the legal interest of the intervener in such a manner as to permit the intervener to appeal therefrom. Whether or not the district court issued a judgment declaratory in form is not, and should not be, determinative of the intervener's right to appeal. The fact is—notwithstanding its form—that the judgment was declaratory of the rights of the Union.

In conferring upon the plaintiff a right to recover money damages, the district court thereby nullified the duty of the employer, formally stated in its agreement with the Union, to lay off, when it became necessary, those who are junior in length of service. If the duty of the employer, as was decided by the district court, was to give continuous actual work to the plaintiff, then the duty of the employer to the Union cannot exist, for they are mutually exclusive. Yet the existence of such a duty to the plaintiff was clearly

expressed by the award to him of money damages for the days on which, in accordance with the collective bargaining agreement, the Corporation laid him off. Such a determination by the district court, erasing as it did the duty of the Corporation to the intervening Union, obliterated equally the correlative right enjoyed by the intervener. The judgment must, therefore, be regarded as so affecting the legal interest of the intervening Union as to support its right to prosecute an appeal therefrom.

It is clear from the record that the intervening Union submitted for judicial determination its claim that the collective bargaining agreement bound both the plaintiff and the defendant. The intervener's proposed findings of fact and conclusions of law (R. 155 *et seq.*) placed squarely before the district court the necessity for determining the effect and validity of the collective bargaining agreement. Particular reference is made to the Intervener's Proposed Conclusions of Law II, III and IV (R. 163-163). The failure of the district court to make these conclusions (R. 171-173) may fairly be regarded as a refusal so to conclude. This refusal had the effect of a denial by the district court that the plaintiff's seniority and his rights pursuant to such seniority were such only as provided in the collective bargaining contract (Intervener's Proposed Conclusion of Law II—R. 163); a denial that the defendant's failure to assign plaintiff to work on the days in question was in conformity with and required by the collective bargaining contract (Intervener's Proposed Conclusion of Law III—R. 164); and a denial that, if the failure to assign the plaintiff to work was a discharge within the meaning of the Act, it was a discharge for cause, said cause being (a) the obligation of the defendant to comply with the provisions of the collective bargaining contract, (b) the obligation of the defendant to comply

with the arbitration award interpreting the contract (Intervener's Proposed Conclusion of Law IV—R. 164-165).

Having thus submitted its claims for judicial determination, the intervener undeniably was in a position to appeal from the judgment, which was adverse to its interests. Cf. *City of Savannah* v. *Jesup*, 106 U. S. 563. The judgment was adverse to the intervening Union's interests because it was grounded upon, and could not have been reached without, a denial of validity to relevant provisions of the collective bargaining contract.

The very permission to intervene, granted to the Union (R. 48), itself indicated that the Union had rights which would be, and were, affected by the judgment. Where it has been thought best to allow a party to intervene and to be heard it is unreasonable to refuse him the right to appeal. *In re New York Investors*, 79 F. (2d) 179 (Second Circuit). If the intervener was in a condition to contend in the district court, if was in a condition to appeal. *Ex Parte Jordan*, 94 U. S. 248. Even where the right to intervention is questionable—and in this case it has not been disputed—once a party has been permitted to intervene, he becomes a real, not merely a nominal, party and, as such, is entitled to appeal. *Texas* v. *Anderson, Clayton & Co.*, 92 F. (2d) 104 (Fifth Circuit).

Nor is it true that, in order for an intervener to have a right to appeal, the judgment must assess damages specifically against the intervener or specifically enjoin him. In *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, this Court held that where the Securities and Exchange Commission had properly been allowed to intervene, the Commission was a "party aggrieved" by the Court's order *refusing to dismiss* the proceeding and was entitled to appeal. The petitioner in the instant case contends that the S. E. C. was

permitted to appeal because of the public interest which it is its duty to protect. A reading of the decision reveals, however, that, while this was the ground for allowing the Commission to intervene, it did not determine the right to appeal once intervention was permitted.

Hamilton Trust Co. v. *Cornucopia Mines Co.*, 223 Fed. 494 (Ninth Circuit), cited by the petitioner, is not in point. It held that the trustee named in a corporate mortgage, *who had been fully paid and whose cause of action had been fully and completely discharged of record*, had no appealable interest in a suit by an employee of the corporation to obtain a lien upon the corporate property, because the trustee had parted with whatever rights it had in the property and could not be prejudiced by subsequent proceedings and because the trustee was not interested in appealing to avoid liability for a deficiency in funds since it was not liable for any such deficiency. In the *Hamilton Trust Co.* case there was no decision rendered which was adverse to the trustee. The petitioner's rights and claims had been fully satisfied and it is altogether reasonable and just that the trustee should have had no right to appeal from a decree creating a lien upon property in which the trustee no longer had any interest. But this lack of interest to be affected certainly cannot be predicated of the Union in the instant case. The Union's contract with the Corporation, which was the *continuing and subsisting* embodiment of the rights and duties of the respective parties, could not, after the district court's determination, be regarded as binding with respect to the duty of the Corporation, when necessary, to lay off returned servicemen in accordance with the procedure set forth therein. Thus, while in the *Hamilton Trust Co.* case the trustee was seeking to appeal from a decree which was not adverse to the trustee, in the instant case the Union appealed to the circuit court from a judgment which was clearly adverse to the Union.

II

There Existed, at the Time of Appeal, a Case or Controversy Which the Circuit Court Could Decide

The petitioner contends that no interest of the Union could have been affected by the judgment of the circuit court and that, therefore, the controversy had become moot. The basis of the petitioner's contention is that, after the expiration of the statutory year, there was nothing against which the judgment prayed for could operate. The money judgment against the Corporation, contends the petitioner, did not adversely affect the respondent Union.

The petitioner overlooks the real problem and takes for granted that the only controversy of the intervening Union in the district court was with the plaintiff. That, however, was not the fact. The Union intervened as a defendant because it was trying to prevent the plaintiff from obtaining a recovery from the Corporation, since a recovery by the plaintiff would effectively invalidate the disputed provision of the collective bargaining agreement. The position of the Union was as adverse to the corporate defendant as it was to the plaintiff. The Union's appellation as a defendant was merely one of convenience; the Union was a plaintiff, as far as the corporate defendant was concerned, because the corporate defendant had previously disregarded the contract between them and had been ordered by an arbitrator to comply therewith. The Union was thus contesting the opposition of the Corporation as well as the Corporation's asserted neutrality (R. 52): It was attempting to obtain from the court a type of judgment which would require the Corporation to comply with its contract. In rendering a money judgment against the corporate defendant, the district court dismissed what was, in effect, the Union's complaint against the Corporation. That dispute still exists and if, as will be shown, the dismissal of the

Union's complaint is *res judicata*, the Union is forever precluded from effectuating its contract with the corporate defendant. This means that there was in existence, at the time the Union appealed to the circuit court, a judgment which affected its rights and which, if unreversed, would continue so to affect them. The passage of one year from the date that the plaintiff was entitled to be restored to his position is totally irrelevant to this dispute and does not render it moot. The question of the validity of the contract then persisted and now persists. In respect of that question the Union's rights were clearly and tangibly in issue and subject to being affected.

> "A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or different." Black, *The Law of Judgments*, 2nd Edition, Sec. 504, p. 764, and cases cited in footnote 9.
>
> "Numerous cases show that a judgment may be binding as an estoppel upon a person who submitted his interest in the subject-matter of the litigation to the consideration of the court and invited its adjudication thereon." *Idem*, Sec. 541, p. 821, and cases cited in footnote 226.

In *Burlen* v. *Shannon*, 99 Mass. 200, the Supreme Court of Massachusetts stated:

> "The estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the bases upon which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion."

Thus, necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. See Black, *The Law of Judgments*, 2nd Edition, Sec. 613.

Lest there be any doubt that the district court's determination rendered the contract between the Union and the Corporation, insofar as it was in issue, invalid and would constitute a defense on the part of the Corporation to any future suit brought by the Union with respect to such issue, the following quotation from an outstanding authority on the law of judgments should make this point clear:

> "* * * The doctrine of res judicata does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried,—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question, the turning-point in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment, as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not. * * *" Black, The Law of Judgments, 2nd Edition, Sec. 614, p. 936.

The point actually litigated in this case was the validity of the contractual provisions between the Union and the Corporation which stipulated that employees with the

least length of service with the employer shall be the first laid off when a decrease in working force becomes necessary. That point was decided adversely to the Union by the judgment of the district court. If passage of the statutory year were to be regarded as having rendered the cause moot and if, as is obvious from the above-quoted portions of Black's treatise on judgments, the judgment, while unreversed, could effectively bar the Union for all time from seeking an adjudication of its rights under the contract, the Union would thus forever be unjustly deprived of its contractual rights. Obviously, therefore, there *was* something against which the judgment prayed for could operate, namely, the Union's contract and the Union's and its members' rights thereunder. The contract, having been in existence at the time the appeal was taken to the circuit court, and being still in existence, the adjudication of the rights of the parties under the contract still exists. Such a case is not moot but is entirely within the jurisdiction of the federal courts as a "case of controversy" within the meaning of Article III, Section 2 of the Constitution.

Conclusion

For all of the foregoing reasons it is respectfully submitted that the court below had jurisdiction in this cause and that its judgment should be affirmed.

M. H. Goldstein,

Counsel for Respondent, Roy Grantata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.